dant's misconduct, future sales of Diet Pepsi in interstate commerce would decline. *Id.* at 615.

There is no square conflict between *Levine* and the decision below. Both courts of appeals held that the interstate commerce element was satisfied because "there was an actual impact on interstate commerce as a result of the tainting." *Levine*, 41 F.3d at 614-615. The Tenth Circuit explained that Levine caused Diet Pepsi sales to decline, *id.* at 615, while the Seventh Circuit explained that petitioner caused pharmacies in Illinois to order OxyContin from Minnesota, Pet. App. 6a. Because the Seventh Circuit's supply-and-demand analysis does not focus solely on *past* effects on interstate commerce, it is not in conflict with the Tenth Circuit's approach.[2]

Thus, although the court of appeals stated that it was declining to follow *Levine* and held that "a violation of § 1365(a) occurs whether the tampering takes place before, during, or after the product moves in interstate commerce," Pet. App. 6a, that methodological disagree-

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[2] Petitioner contends (Pet. 10) that Illinois pharmacies did not need to replenish their supplies of OxyContin because his patients (to whom he prescribed the drug) "did not need it in the first place." Even assuming *arguendo* that the patients had no need for OxyContin or some other pain medication manufactured out of state, the net effect of petitioner's scheme was still to increase demand for OxyContin in Illinois, with the inevitable effect that more OxyContin had to be shipped from Minnesota to Illinois. See *Moger*, 192 F.3d at 1021-1022 (holding that it was irrelevant whether patients' use of morphine would have resulted in same depletion of supply as doctor's theft, because "[t]he fact remains that [the doctor] stole the morphine * * * and the reduction in supply was thus a result of her actions and not theirs"). Although petitioner claims (Pet. 10) that there is no record evidence to that effect, petitioner's guilty plea relieved the government of the burden of presenting evidence at trial, and the record does reflect that OxyContin is manufactured out of state. Pet. App. 20a.

ment has no significance in this case. Nor is it clear that the disagreement will be dispositive in other cases, given the fact-specific nature of the inquiry and the infrequency with which the issue arises. Indeed, *Levine* and the decision below are the only cases cited by petitioner on this issue, and both held that the interstate commerce element was satisfied.

c. To the extent that there is a methodological disagreement between the Seventh and Tenth Circuits, the decision below is correct that "a violation of § 1365(a) occurs whether the tampering takes place before, during, or after the product moves in interstate commerce." Pet. App. 6a. Congress broadly prohibited "tamper[ing] with any consumer product that affects interstate or foreign commerce." 18 U.S.C. 1365(a). Congress's use of the term "affects" commerce is significant, because the phrase "affecting commerce * * * normally signals Congress' intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); see *Russell* v. *United States*, 471 U.S. 858, 859 (1985); *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977).

For that reason, this Court has long construed an analogous statute prohibiting felons from possessing firearms "in or affecting commerce" (18 U.S.C. 922(g)(1)) to require only "the minimal nexus that the firearm have been, *at some time*, in interstate commerce." *Scarborough*, 431 U.S. at 575 (emphasis added). Proof that a gun traveled in interstate commerce *before* the offense is therefore sufficient to satisfy the "affecting commerce" element of a felon-in-possession charge. See *ibid.* The same analysis applies here: at a minimum, Section 1365(a) prohibits tampering with consumer products once they enter the stream of com-

merce, regardless of whether the tampering causes some additional effect on interstate commerce. Here, that means that petitioner violated the statute by tampering with OxyContin tablets after they had traveled in interstate commerce.

d. In light of that analysis, counsel did not render deficient performance in advising petitioner to plead guilty instead of pursuing an unmeritorious jurisdictional defense at trial. Indeed, counsel would have been derelict in advising petitioner to go to trial based on *Levine*, given that petitioner's conduct affected interstate commerce even under the analysis in that case. In any event, further review of the fact-specific questions whether the interstate commerce element is satisfied in this case, whether counsel acted unreasonably in recommending that petitioner accept the benefits of a plea bargain instead of attempting to prevail at trial on that issue, and whether any unreasonable performance resulted in prejudice, is not warranted.

2. Petitioner also argues (Pet. 13) that his counsel should have advised him that he could have asserted a defense of involuntary drug addiction to the charge of obtaining a controlled substance by fraud in violation of 21 U.S.C. 843(a)(3). Petitioner did not raise that contention in the court of appeals, and that court did not address it. To the contrary, petitioner *conceded* in the court of appeals that he "violated 21 U.S.C. § 843(a)(3)." Pet. C.A. Reply Br. 11; accord *id.* at 8 n.4 ("Dr. Hays is not challenging his conviction on Count 2 except to the extent that he was sentenced to the statutory maximum on Count 2 because of the greater sentence received on Count 1."). Review should be denied for that reason alone. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*,

534 U.S. 103, 109 (2001); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

Moreover, involuntary drug or alcohol addiction is not, standing alone, a valid defense. In addition to showing that he became addicted involuntarily, petitioner would have to show that at the time of the offense he did not know the nature and quality of his acts or know that those acts were wrong. See, *e.g.*, *United States* v. *F.D.L.*, 836 F.2d 1113, 1116-1117 (8th Cir. 1988). Petitioner could not possibly prevail on such a defense, in part because his own testimony demonstrates that he retained the capacity to make moral distinctions. For example, petitioner stated at the change-of-plea hearing that crushing OxyContin was something that he "would have never done" because it would have been "dangerous" for his patients. Pet. C.A. App. A at 35; Pet. App. 21a. At sentencing, petitioner similarly stated that he broke OxyContin tablets in half because he believed, based on consultation with a pharmacist, that doing so would not be harmful to his patients. Pet. C.A. App. B at 9-10. Counsel did not act unreasonably in failing to advise petitioner of an untenable defense, and knowledge of such a defense could not plausibly have motivated petitioner to plead not guilty. In any event, such a fact-bound claim does not warrant further review. See Sup. Ct. R. 10.[3]

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[3] Although the petition for a writ of certiorari appears to raise only an ineffective-assistance-of-counsel claim, some language in the petition might be construed to raise a separate attack on the plea based upon the contention that petitioner's plea was unintelligent and involuntary because he did not understand the elements of the crime. See Pet. 14, 15. Such a claim would be procedurally defaulted because petitioner failed to raise it on direct appeal. See *Bousley* v. *United States*, 523 U.S. 614, 621 (1998). Because petitioner cannot show any cause for that

3. Finally, petitioner claims (Pet. 13, 14), without elaboration, that "it is undisputed" that defense counsel used threats and misrepresentations to persuade him to plead guilty. As the court of appeals explained, the record does not support that claim. See Pet. App. 9a-11a. At the change-of-plea proceeding, the district judge asked petitioner whether anyone, including defense counsel, had "attempted in any way to force" him or to "put undue pressure" on him to plead guilty, and petitioner answered, "[c]ertainly not my counsels, Judge." Pet. C.A. App. A at 22. Petitioner stated in response to further questioning from the court that "nobody has * * * twisted my arm to make this plea," and that he was pleading guilty "of my own free will." *Id.* at 24; Pet. App. 10a.

Nor is petitioner entitled to relief on the ground that counsel provided him with incorrect information. Petitioner argued below that counsel erroneously told him that he would receive a prison sentence of 10-20 years if he did not plead guilty, and that a guilty plea would probably result in little or no prison time. Pet. App. 31a. Even assuming *arguendo* that counsel made those representations, both the plea agreement (Pet. C.A. App. C at 6) and the district court at the change-of-plea proceeding (Pet. C.A. App. A at 15; Pet. App. 8a) correctly informed petitioner that, barring a departure, his sentence under the Sentencing Guidelines would be 51-63 months. The district court emphasized to petitioner that he was "looking at prison time * * *, not probation" (Pet. C.A. App. A at 10), and later imposed the lowest

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failure, he would bear the burden of proving that he is actually innocent. *Id.* at 622. Petitioner cannot carry that burden. His sole claims of innocence (*i.e.*, challenges to the interstate commerce element and mental state element) lack merit for the reasons explained above.

sentence (51 months) in the range explained to petitioner. See Pet. App. 1a.

Accordingly, at the time he pleaded guilty, petitioner had an accurate understanding of the consequences of his plea. Especially in view of the benefits of the plea (including a substantial reduction in the likely sentence, see Pet. App. 8a), and the strength of the government's case (which would have included eyewitness testimony of the patients petitioner victimized, see Pet. C.A. App. A at 31), the allegedly erroneous representations of counsel could not have affected petitioner's decision to plead guilty. In any event, petitioner's fact-bound claims do not warrant further review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2005

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No. 05-54

IN THE

Supreme Court of the United States

JON RILEY HAYS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. A True Conflict As Contemplated By Supreme Court Rule 10(a) Exists Between The Tenth And Seventh Circuits In The Construction Of 18 U.S.C. § 1365(a)

The Government objects to the issuance of the certiorari writ by a new point that the Government raises in its brief:

> There is no square conflict between *Levine* and the decision below. Both courts of appeals held that the interstate commerce element was satisfied because "there was an actual impact on interstate commerce as a result of the tainting." *Levine*, 41 F.3d at 614-615. The Tenth Circuit explained that *Levine* caused Diet Pepsi sales to decline, id. at 615, while the Seventh Circuit explained that petitioner caused pharmacies in Illinois to order Oxycontin from Minnesota. [Resp. 8.]

The Government refers to the Seventh Circuit's opinion in the case at bar, *Hays v. United States*, 397 F.3d 564 (2005), wherein the Seventh Circuit engaged in pure conjecture:

> Because of the prescriptions he [Dr. Hays] wrote to facilitate his use of the drug, pharmacies in Illinois were required to order more Oxycontin from Minnesota to replenish their supplies. *Hays v. United States*, 397 F.3d at 568.

There is no citation to the record for the proposition that pharmacies in Illinois were required to order additional Oxycontin—that is because there is nothing in the record to support that proposition. Nowhere in the evidence was there any mention - in any context - of any Illinois pharmacy. As Dr. Hays has already noted, "The patients from whom Hays stole the drug did not need it in the first place. It was unnecessary for those patients to be treated with Oxycontin." Pet. 10.

More importantly, Dr. Hays did not plead to having caused Illinois pharmacies to replenish Oxycontin. Dr. Hays admitted in his plea that Oxycontin was manufactured in Minnesota. That is the only fact on the record that relates to the interstate commerce element of 18 U.S.C. § 1365(a). Under the *Levine* construction of the statute, the effects on interstate commerce must occur either at the time or after the tampering, not before. *Levine*, 41 F.3d at 613. If the *Levine* rationale is the correct construction of 11 U.S.C. § 1365(a), then Dr. Hays pleaded guilty to a non-existent crime, which is in direct, square, clear and absolute conflict with the rule established by the Seventh Circuit in the case at bar: "We find that a violation of § 365(a) occurs whether the tampering takes place before, during or after the product moves in interstate commerce." *Hays*, 397 F.3d at 568.

II. Petitioner Hays Did Receive Ineffective Assistance Of Counsel In Pleading To A Non-Existent Crime

The Government raises the new point that Dr. Hays reads 18 U.S.C. § 1365(a) "narrowly". Resp. 7. The Government argues that if the statute is not read "narrowly", then there is merely a "methodological disagreement" between the Circuits [Resp. 9], and therefore, "in light of that analysis, counsel did not render deficient performance." Resp. 10.

The answer to the Government's claim is that Dr. Hays does not read the statute "narrowly." Rather, Dr. Hays reads it the way that Congress wrote the statute – its plain meaning. Dr. Hays reads the plain text of the statute with the same construction that the Tenth Circuit gives it. Dr. Hays believes that when Congress used the present tense of the verb "affects", Congress did not mean the past tense of that verb. In other words, Congress didn't mean "affected". To read the words as Congress wrote them is not to read the statute "narrowly". Petitioner Hays respectfully suggests that the Seventh Circuit effectively amended 18 U.S.C. § 1365(a) by writing the word "affected" into its language in the case at bar.

Dr. Hays' conduct did not violate 18 U.S.C. § 1365(a). Dr. Hays certainly did not plead to facts which would have constituted a violation of § 1365(a). None of Dr. Hays' counsel raised *Levine* to the trial court. Similar to the court in *Bousley v. United States*, "the record reveals that neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged." *Bousley v. United States*, 523 U.S. 614, 618, 188 S. Ct. 1604, 1609 (1998). Contrary to the Government's argument that Dr. Hays' counsel did not act unreasonably [Resp. 6], counsel for Dr. Hays were ineffective because they allowed him to plead to a non-existent crime. As a result of their ineffective assistance, Dr. Hays was prejudiced because he was sent to prison.

III. If This Conflict Between The Circuits Is Not Resolved, There Will Be Many Instances In Which People Within The Seventh Circuit's Jurisdiction Will Be Sent To Prison For Violations Of 18 U.S.C. § 1365(a), While People Within The Tenth Circuit's Jurisdiction Who Commit The Very Same Acts Will Go Free

The Government raised the new point that the issue at bar will arise with "infrequency." Resp. 9. There is nothing in the record to justify that assertion. To the contrary, the innovative prosecutors who brought the case at bar converted what was essentially a simple theft to a tampering crime under § 1365(a). The charge that Dr. Hays pleaded to was a serious, violent crime, which resulted in a 51-month prison sentence. If this conflict between the Circuits is left unresolved, people in Illinois who steal pharmaceutical products (which will require Illinois pharmacies to replenish supplies of the stolen medicine) will be subject to charges under 18 U.S.C. § 1365(a). The same thing will happen in Indiana and Wisconsin. Aggressive federal prosecutors will indict and convict people within the Seventh Circuit's jurisdiction for conduct that is a non-existent crime in the Tenth Circuit.

IV. Petitioner Hays' Plea Was Not Voluntary

The Government raises the new point that counsel who conveyed an erroneous threat of 10-20 years' prison time would not be ineffective because the trial court told Hays that he would be sentenced to less than 10-20 years. Resp. 12. The Government also argues that the record does not support the claim that Hays received threats from his lawyers to induce him to plead guilty. *Id.* The record proves exactly the opposite: Hays' sworn Motion for Relief under 28 U.S.C. § 2255 refers to the threats received from his lawyers. *See* Pet. App. H, 30a-31a. Hays' testimony is uncontradicted, unrebutted and undisputed in the record. Hays alleged that he was actually innocent and he swore that his counsel "misrepresented numerous material facts and principals (sic) of law to me." Pet. App. 30a. Hays then swore to four separate threats that his counsel conveyed to him (allegedly from prosecutors) that induced him to plead guilty. *Id.* at 30a-31a. The trial court denied Hays' Motion for an evidentiary hearing. In any event, the Government chose not to challenge Hays' sworn testimony, which had specifically and in detail outlined counsels' threats.

The Court has stated the following principle regarding the voluntariness of a guilty plea:

> [A] plea of guilty entered by one fully aware of the direct consequences of the plea is voluntary in a constitutional sense *unless induced by threats, misrepresentation, or perhaps by promises that are by their nature improper. Bousely,* 523 U.S. at 619 (citing *Brady v. U.S.*, 397 U.S. 742, 90 S.Ct. 1463 (1970)(internal quotations and ellipses omitted)) (emphasis added).

The situation contemplated by the *Bousely* court is precisely the situation in the case at bar. The undisputed fact that Hays' plea on both counts was induced by threats and misrepresentation should operate to vacate his conviction in both counts.

CONCLUSION

A direct, square and irreconcilable conflict exists between the Tenth Circuit's *Levine* case and the Seventh Circuit's *Hays* case in the construction of 18 U.S.C. § 1365(a). This conflict will result in many people going to prison in Illinois, Indiana and Wisconsin for the same conduct that is a non-existent crime in Colorado, Utah, Wyoming, Kansas, Oklahoma and New Mexico. Hays' counsel were ineffective because counsel induced him to plead guilty to a non-existent crime and also induced him to plead guilty to both counts of conviction through threats and misrepresentation.

Respectfully submitted,

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